No. 18-485

In The
Supreme Court of the United States

EDWARD G. McDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, A/K/A/ TREY SMITH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE FOR THE ST. THOMAS MORE LAWYERS GUILD OF ROCHESTER, NEW YORK IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The St. Thomas More Lawyers Guild ("The Guild") is an IRC 501(c)(3) corporation and association of attorneys in the Rochester, New York area committed to the Catholic principles of natural law, natural reason, and the traditions of natural rights that animated our nation's founding.

The Guild believes that jurisprudence in the United States frequently strays from these fundamental principles. Specifically in this case, the Guild seeks the restoration of the traditional and time honored axioms of due process. Chief among these axioms is the concept of fundamental fairness to defendants in criminal proceedings, and redress for injured parties when our courts have fallen short in their observance of this transcendent moral and legal value.

I. SUMMARY OF THE ARGUMENT

As long ago as 1935, this Court held that deliberate lying and cheating by government officials *to obtain a criminal conviction* violated an accused's

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[1] In accordance with Supreme Court Rule 37(3)(a) and (b), the Guild sought the consent of both parties to file the within proposed brief. Petitioner has filed a blanket consent form as of February 26th; Respondent consented by email to undersigned counsel on March 1st, 2019. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Fourteenth Amendment right to due process of law. *Mooney v. Holohan*, 294 U.S. 103 (1935). In this case government officials lied and cheated in an effort to obtain a criminal conviction but the accused, although tried twice, was ultimately acquitted.

Amicus is concerned that in the wake of *Manuel v. City of Joliet*, 580 U.S. ___, 137 S.Ct. 911 (2017) this Court may regard the present case as involving pretrial Fourth Amendment constitutional violations that time bar the accused's resulting action for damages under 42 U.S.C. §1983. We believe the Court should reject a Fourth Amendment analysis in this case. *Deliberate* conduct by government officials actually intended to injure should be, and historically has been, regarded as implicating due process rights, not Fourth Amendment rights. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

While there has been considerable confusion in the circuit courts and this Court on this and related questions over the last two decades, the great weight of circuit court authority has nevertheless continued to regard the kind of deliberate conduct at issue in this case in due process terms. And because an explicit and unambiguous restoration of traditional due process principles in line with this authority would more clearly resolve the statute of limitations issue presented by this case – while at the same time providing clearer guidance in future cases – this amicus urges the Court to decide in favor of the Petitioner on that basis.

In other words, we ask this Court to hold firmly that deliberate lying and cheating by government

officials at any point in a criminal prosecution causes a corruption of the process and a constitutional injury that ceases only when the corrupted process itself is *corrected*, which means simply that it ends favorably to the accused.

II. ARGUMENT

A. DUE PROCESS TRADITIONALLY APPLIED TO ALL STAGES OF A CRIMINAL PROSECUTION

Until fairly recently there had never been any doubt that the requirement of due process for criminal defendants encompassed " . . . the entire course of proceedings in the courts of the State, and not merely a single step in those proceedings. . . ." *Frank v. Mangum*, 237 U.S. 309, 331-332 (1915); *accord*, *Malinski v. New York*, 324 U.S. 401, 416-417 (1945). "Due process" later came to include a requirement of basic honesty and good faith on the part of government officials so that a conviction obtained through *deliberate* fabrication of evidence, suppression of exculpatory evidence or use of perjured testimony was held to be invalid on due process grounds. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967). Due process was also held to prohibit law enforcement misconduct preceding – and even wholly outside of – the criminal judicial process, such as when that misconduct "shocked the conscience." *Rochin v. California*, 342 U.S. 165 (1952).

Still later this Court held that an improper motive on the part of a prosecutor – "prosecutorial vindictiveness" – invalidated a criminal prosecution entirely, requiring the dismissal of the criminal charges themselves, once again on due process grounds. *Blackledge v. Perry*, 417 U.S. 21 (1974).

B. THE GENESIS OF A CONTRARY VIEW, BASED ON AN ERROR

As the 1970s continued, however, a counter-trend developed. In a significant case the Ninth Circuit held that perjury used before a grand jury *unintentionally* by a prosecutor[2] – who not only disclosed it to opposing counsel but admitted it before the trial jury – required reversal of the conviction and dismissal of the indictment under the *Mooney* line of cases. *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). The decision was not well received. *United States v. Udziela*, 671 F.2d 995, 1000 (7th Cir. 1982) (collecting cases).

Then newly appointed Justice Rehnquist embraced this counter-trend. Believing in the importance of preserving " . . . the perception of the trial of a criminal case in state court as a decisive and portentous event . . . " [*Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)], he took issue with the proposition that the prosecution's use of perjured testimony before a grand jury deprived a defendant of due process of law, in a

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[2] Because the prosecutor's conduct was not in bad faith, it is likely that the *Basurto* decision should not have been considered under the *Mooney* line of cases at all.

rare opinion as a circuit justice. *Bracy v. United States*, 435 U.S. 1301 (1978). In so doing he cited *Costello v. United States*, 350 U.S. 359 (1956) and *Mooney*, stating that the latter " . . . held that the knowing introduction of perjury *at a criminal trial* rendered the resulting conviction constitutionally invalid." (emphasis supplied).

Unfortunately, this was an entirely incorrect statement of the law: *Costello* was not a due process case at all, and *Mooney*'s due process proscription against deliberate official misconduct in "obtaining a conviction" had never been confined to conduct occurring at a trial. Indeed, there were a series of cases decided by this Court in the 1940s overturning criminal convictions based on guilty pleas, citing *Mooney*, where there was no trial at all. *Walker v. Johnston*, 312 U.S. 275 (1941); *Waley v. Johnston*, 316 U.S. 101 (1942); *New York ex rel. Whitman v. Wilson*, 318 U.S. 688 (1943).[3]

C. THE CONFLATION OF DUE PROCESS WRONGS WITH IMMUNITY QUESTIONS

Meanwhile, beginning around the same time as the counter-trend this Court was developing the law of "absolute" and "qualified" immunity for prosecutors and police in §1983 actions over misconduct during the

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[3] It is unlikely that Justice Rehnquist ever genuinely held the view that due process did not apply to pretrial government conduct: he later joined an opinion by Justice Thomas that explicitly endorsed the application of due process to a police interrogation, before any charges were even brought. *Chavez v. Martinez*, 538 U.S. 760, 773 (2003).

course of criminal prosecutions, beginning with *Imbler v. Pachtman*, 424 U.S. 409 (1976). Two noteworthy decisions in the early 1990s considered whether absolute prosecutorial immunity would extend to pretrial conduct such as presenting false evidence at probable cause hearings and wrongly advising police during an investigation: *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

These decisions not only resonated with Justice Rehnquist's *Bracy* view[4]; they apparently accustomed this Court to viewing criminal prosecutions in discrete, time divided segments – e.g., before charges are brought, after initiation of process, pre-trial judicial proceedings, and the trial itself – for purposes of deciding whether a prosecutor was absolutely immune from suit.[5] But shortly after *Burns* and *Buckley* this analytical device, however useful it may have been in defining the scope of absolute prosecutorial immunity, spilled over into the question of whether there had been a constitutional violation in the course of a criminal prosecution in the first place, and if so what specific constitutional provision was involved.[6]

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[4] Also by 1991, *Bracy* was cited in a United States Justice Department Grand Jury training manual for the proposition that " . . . most courts view grand jury proceedings as outside the scope of the due process clause. . . ." *USDOJ Grand Jury Training Manual, Antitrust Division, First Edition* (November, 1991), p. IV-97.

[5] This approach was subtly incompatible with the traditional view that due process in criminal cases encompassed the entire process from the beginning.

[6] Ironically, an apparently prescient *Buckley* majority noted the danger of "conflating" questions of immunity with questions

The result was a fractured decision (five different opinions for affirmance and a two Justice dissent) from this Court in 1994. *Albright v. Oliver*, 510 U.S. 266 (1994). Significantly, a footnote in the plurality opinion, authored by Justice Rehnquist, repeated the error he had made earlier in *Bracy* to the effect that the *Mooney* due process line of cases pertained only to the use of perjury at a trial. 510 U.S. at 273, fn. 6

In her influential concurring opinion in *Albright*, however, Justice Ginsburg suggested that the Fourth Amendment was a better "lens" (510 U.S. at 276) through which to view the issue of the pre-trial use of false allegations by government officials in criminal prosecutions and the attendant damages in §1983 actions.[7] Justice Ginsburg thus would have preserved a cause of action for Albright, except that Albright had expressly waived any claim under the Fourth Amendment and elected to proceed exclusively on due process grounds.[8]

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regarding the substance of a constitutional violation, claiming that the dissent had done precisely that. 509 U.S. at 274, fn. 5.

[7] Justice Ginsburg's view may have been further prompted by the complicating fact that *Albright* involved incredibly sloppy police work (use of a notoriously unreliable informant) instead of the traditional due process issue of *deliberate* misconduct. That is, she may never have meant to suggest that the kind of deliberate and malicious conduct at issue in this case implicated Fourth Amendment rather than due process concerns.

[8] In *Manuel v. City of Joliet*, the Petitioner did the reverse; that is, he waived any reliance on due process grounds and proceeded entirely under a Fourth Amendment rationale. One relevant problem with that – as Justice Alito pointed out at length in dissent – is that the Fourth Amendment does not involve a

Justice Stevens retained the traditional view that a due process violation might occur at any stage of a criminal prosecution, but of course in *Albright* he was writing in dissent, joined only by Justice Blackmun.

D. THE FALLOUT FROM *ALBRIGHT*

1. *ALBRIGHT* ASIDE, THERE IS A CONSENSUS IN THE NATION'S COURTS OF APPEALS THAT DUE PROCESS, AND NOT THE FOURTH AMENDMENT, GOVERNS CLAIMS LIKE THIS PETITIONER'S

Despite the ambiguity generated by the *Albright* decision and its foray into Fourth Amendment analysis, however, circuit courts have almost uniformly continued to regard deliberate lying and cheating by government officials in criminal prosecutions as a due process concern, regardless of when in the process it had occurred or even whether there had been a conviction. *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2001); *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008); *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012).[9] The most emphatic of these circuit

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"process" but rather "seizures" that end when they occur, and the concept of a "continuing seizure" that would imply a later starting point for a limitations period is ultimately untenable. 137 S.Ct. 926, et seq. (Alito, J., dissenting).

[9] But compare, *Alexander v. McKinney*, 692 F.3d 553 (7th Cir. 2012) (holding that an acquittal at trial "effectuated" due process, precluding a due process violation).

court opinions on this point came from the First Circuit:

> "Although constitutional interpretation occasionally can prove recondite, some truths are self-evident. This is one such: if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from fabricating evidence and framing individuals for crimes they did not commit. Actions taken in contravention of this prohibition necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction)."

Limone v. Condon, 372 F.3d 39, 44-45 (1st Cir. 2004).

2. NEVERTHELESS, THE CONFLATION WITH IMMUNITY ISSUES CONTINUES TO CLOUD THE DUE PROCESS ANALYSIS

Yet perhaps the most pertinent of the circuit court decisions for present purposes was from the Second Circuit, because in *Zahrey* – as here – there was never a conviction. 221 F.3d at 346

Zahrey reached the right result – holding that a §1983 cause of action grounded in fabrication of evidence by government officials sounded in due process – but the court also exacerbated the problem of conflating immunity with its analysis of the constitutional wrong:

> "We think the right at issue in this case is appropriately identified as the right not to be deprived of liberty as the result of the fabrication of evidence by a government official *acting in an investigative capacity*."

221 F.3d at 349 (emphasis supplied).

The distinction between acting in an "investigative capacity" as opposed to an "advocacy role" determines whether a prosecutor is *immune*, not whether a constitutional injury occurred. Conflating these two issues immediately forced the Second Circuit to address – in a rather confusing five and one half pages (221 F.3d at 349-355) – a causation question that disappears once the conflation is eliminated.

In other words, like this Petitioner's constitutional injury *Zahrey*'s is properly viewed as being caused by the *process* having been corrupted by government officials through their fabrication of evidence, and his injury at the hands of that process continued until the corrupted process was terminated by his acquittal.

3. THE CONFUSION FOUND ITS WAY TO THIS COURT IN 2009 BUT THE COURT WAS NOT ABLE TO ADDRESS IT

The last time this Court fully considered the due process ramifications of deliberate fabrication of evidence and similar dishonest conduct by government officials in criminal prosecutions was in an appeal from the Eighth Circuit's *Pottawattamie* case (Supreme

Court Docket No. 08-1065). One relevant exchange took place at oral argument[10] between Justice Kennedy and Mr. Katyal (who represented the Solicitor General in *Pottawattamie* but now represents the Petitioners here):

> JUSTICE KENNEDY: What if a prosecutor knows that it's fabricated evidence? The police officer fabricates the evidence and says: Mr. Prosecutor, it's a very bad man; I fabricated the evidence. The prosecutor introduces it. What result there? See, your footnote 6 presumes that the prosecutor doesn't know.
>
> MR. KATYAL: Right.
>
> JUSTICE KENNEDY: Suppose he knows?
>
> MR. KATYAL: And if the prosecutor does know, we don't think that there is a Fifth Amendment due process violation.
>
> JUSTICE KENNEDY: Against the policeman?
>
> MR. KATYAL: Against – against the policeman in that circumstance, because the –
>
> JUSTICE KENNEDY: Again, the more aggravated the tort, the greater the immunity.
>
> MR. KATYAL: And I agree that that seems a little odd –

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[10] The official transcript of the oral argument in *Pottawattamie* is located on this Court's website here: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-1065.pdf.

> JUSTICE KENNEDY: You're basically saying that you cannot aid and abet someone who is immune, and that's just not the law . . .

Official transcript, 08-1065, pp. 20-21.

Later in the argument, another relevant exchange occurred between Justices Ginsburg, Stevens and Mr. Sanders (representing the Petitioners):

> JUSTICE GINSBURG: You said – I think your position is that due process begins when trial is underway, and before that due process doesn't enter the picture?
>
> MR. SANDERS: Your Honor, I believe that this Court's decisions make clear that due process applies to the judicial process; that is, the filing of charges and the later conduct of the prosecuting –
>
> JUSTICE STEVENS: Yes, but what about the pretrial detention? Isn't that a deprivation of liberty?
>
> MR. SANDERS: Your Honor, it would be, but that would be Fourth Amendment territory.
>
> JUSTICE STEVENS: Why would it be Fourth Amendment? Why isn't it Fourteenth Amendment right on the nose? They're deprived of liberty without due process of law.
>
> MR. SANDERS: Your Honor, this Court – seven justices in this Court's decision in *Albright* agreed that there was no due process cause of action for the wrongful institution of criminal proceedings . . .

Id., pp. 59-60.

Unfortunately, after argument and submission for decision the parties in *Pottawattamie* settled and the case was dismissed under Supreme Court Rule 46. This Court was thus never able to address the confusion surrounding due process and immunity issues in the wake of *Albright* in that case, and could not do so in 2017's *Manuel* because the Petitioner in that case abandoned all reliance on due process principles.

III. CONCLUSION

This Court should take the opportunity it has now, in this case, to clarify and simplify the law in this important area by holding plainly that deliberate dishonesty by government officials in criminal cases – whether through fabricating evidence, willfully suborning perjury or like conduct – violates an accused's right to due process of law, and that violation continues until the tainted process ends with dismissal of the criminal case in the accused's favor.

Dated: March 4, 2019

Respectfully submitted,

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